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Nos. 81-2147 and 81-2188

In The

Supreme Court of the United States

October Term, 1982

STATE OF ARIZONA, et al.,
Petitioners,

vs.

SAN CARLOS APACHE TRIBE OF ARIZONA, et al.,
Respondents.

STATE OF MONTANA, et al.,
Petitioners,

vs.

NORTHERN CHEYENNE TRIBE OF THE NORTHERN CHEYENNE INDIAN RESERVATION, et al.,
Respondents.

ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF OF CROW TRIBE OF INDIANS, Respondent in No. 81-2188, ON THE DISCLAIMER ISSUE

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QUESTION PRESENTED

Whether the disclaimers of state jurisdiction over Indian lands contained in the Enabling Acts for Montana and Arizona and in their Constitutions prevent the courts of those States from adjudicating Indian reserved water rights.

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BRIEF OF CROW TRIBE OF INDIANS, Respondent in No. 81-2188, ON THE DISCLAIMER ISSUE

STATUTES AND CONSTITUTIONAL PROVISIONS INVOLVED

Because of their number and considerable length, the relevant statutes and constitutional provisions listed below are reproduced in the Appendix to this Brief at the

pages indicated. Significant and relevant parts of these laws were omitted in the portions reproduced by the Petitioners.

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STATEMENT OF THE CASE

The Crow Tribe adopts the Statement of the Case in the Brief of Respondents Assiniboine and Sioux Tribes, et al.

The Crow Tribe also adopts the Argument in the Brief of Respondents Assiniboine and Sioux Tribes, et al. on the issues presented in this case other than the disclaimer issue.

SUMMARY OF ARGUMENT

The disclaimer provisions in both the Federal Enabling Acts for Montana and Arizona and the Montana and Arizona Constitutions "vest absolute jurisdiction and control" over Indian lands in the Congress. Their plain meaning flatly excludes state court jurisdiction over Indian lands and water rights. Congress imposed the disclaimer requirement on new states admitted after the decision in *United States v. McBratney*, 104 U. S. 621 (1882), in order to eliminate the uncertainty created by that decision, to make clear that exclusive federal jurisdiction over Indian lands would not be affected by the admission of new states, and to fulfill the nation's treaty commitments to the Indian tribes.

Petitioners' efforts to avoid the plain meaning and clear history of the disclaimers are unavailing. Their contention that the disclaimers are limited to proprietary matters conflicts with their clear meaning in three distinct respects. It is also contrary to their legislative history, to numerous decisions of this Court applying the

disclaimers in Indian jurisdiction disputes, and to the understanding manifested by Congress as well as the disclaimer states. The cases on which petitioners rely are distinguishable because they involve either off-reservation Indian activities or on-reservation conduct of non-Indians.

The McCarran Amendment does not undermine the effect of the disclaimers which were expressly made "irrevocable without the consent of the United States and the people of [Montana or Arizona]." The McCarran Amendment is a simple and narrow statute. It waives the immunity of the United States in water adjudication suits, but it does not mention Indians, Indian tribes, Indian reservations, Indian water rights, or the disclaimers. References to Indian water rights in the legislative history are rare, and there are no references at all to the disclaimers. There is no evidence at all of any intent to revoke the disclaimers by implication.

Without the McCarran Amendment, the United States could not be sued without its consent in federal or state courts. Effect can be given to both the disclaimers and the McCarran Amendment by holding that the Amendment's waiver of immunity is limited to federal court adjudications of the water rights of Montana's and Arizona's Indian tribes. Since this Court has held that the McCarran Amendment does not compel adjudications of water rights in state courts, there is no irreconcilable conflict between the two statutes. The two statutes are entirely capable of co-existence, so the standards for finding an implied repeal have not been met. This result is also supported by the well-established rule that abrogation of important Indian rights and immunities requires express

Congressional action and by contemporaneous legislation in which Congress explicitly repealed the disclaimers when subjecting Indians to limited state court jurisdiction.

The disclaimers in the States' Constitutions constitute a separate and independent barrier to state court jurisdiction over Indian water rights. Assuming *arguendo* that the McCarran Amendment somehow removed the federal enabling act barrier, questions of both federal and state law would remain concerning the continuing effect of the Constitutional disclaimers on adjudications of Indian water rights in the courts of Montana and Arizona. It would not be appropriate for this Court to resolve these questions in the present posture of this case.

Colorado River Water Conservation District v. United States, 424 U. S. 800 (1976), did not involve the disclaimer issue because Colorado is not a disclaimer state and the question was not raised by the litigants or discussed by the lower courts or by this Court. There is no apparent reason why disclaimer and non-disclaimer states must be subject to the same rule. Congress has frequently applied different laws to Indians in different states. In deliberately adopting a new form of Indian disclaimer for states admitted after the 1882 *McBratney* decision, Congress presumably recognized that this departure from the previous norm would make a difference. If uniformity is desired, the logical method of achieving it would be to conform the practice in non-disclaimer states with that in disclaimer states since more than 90% of all Indian lands, including the 21 largest reservations, are located in the disclaimer states.

The enabling act disclaimers are valid federal statutes that were reenacted 8 times between 1889 and 1959.

They have not been repealed and therefore cannot be ignored. It is not surprising that Congress did not expressly contemplate different results in disclaimer and non-disclaimer states when the McCarran Amendment was adopted because Indian water rights received very little attention and the disclaimers passed by entirely unnoticed. In any event, the remedy for changing the unforeseen effects of valid laws lies with the Congress, not the courts.

ARGUMENT

Introduction

Indian water rights should be adjudicated in the federal courts. After thoroughly reviewing all facets of the choice of forum question and weighing the respective advantages and disadvantages of federal and state courts for adjudicating Indian water rights, the National Water Commission, an expert body established by the Congress (82 Stat. 868) (1968) whose members were appointed by the President, recommended that such suits be conducted in the federal courts.

> Because of potential conflict between Indian and non-Indian water users and to avoid the suspicion of bias that might attend adjudication by elected State officials, the Commission recommends that Indian water rights be adjudicated in Federal Court, the traditional forum for this kind of litigation.

Water Policies for the Future, Final Report to the President and to the Congress of the United States by the National Water Commission 479 (1973).[1] *See also*, the Intro-

[1]This Court relied on the National Water Commission's *Final Report* in Cappaert v. United States, 426 U. S. 128, 142 (1976).

duction and Part I of the Brief of Respondents Assiniboine and Sioux Tribes, et al., which are incorporated in this Brief by reference.

I.

Federal and State Disclaimers of Jurisdiction Prohibit Montana and Arizona State Courts from Adjudicating Indian Water Rights.

The state courts of Montana and Arizona do not have jurisdiction to determine the federal reserved water rights of the respondent Indian Tribes. The disclaimer provisions in both the Federal Enabling Acts and the Montana and Arizona Constitutions vest "absolute jurisdiction and control" over such matters in the Congress of the United States. These laws also specify that this absolute prohibition of state jurisdiction is "irrevocable without the consent of the United States and the people of [Montana and Arizona]". Neither Congress nor the people of those states has given such consent. Accordingly, as a matter of both federal and state law, the Montana and Arizona state courts are precluded from adjudicating Indian water rights.

Our argument focuses first on the federal Enabling Acts pursuant to which Montana and Arizona were admitted into the Union in 1889 and 1910. Those statutes contain Congress' explicit insistence that Montana and Arizona disclaim all jurisdiction over Indian lands within their borders. Neither the McCarran Amendment nor the decision in *Colorado River Water Conservation District v. United States*, 424 U. S. 800 (1976) (hereafter cited as *Akin*), nor anything else that has happened since 1889 and 1910, revokes or repeals the disclaimers in the Enabling Acts. Those requirements bar Montana's and Arizona's courts from deciding the Indians' rights.

The disclaimer provisions in the Constitutions of Arizona and Montana constitute a separate and independent barrier to state court adjudications of Indian property rights. Even if Congress has somehow terminated the Enabling Act's federal disclaimer requirement—which it has not—the States' Constitutional disclaimers remain in effect and bar the States' courts from adjudicating Indian water rights unless they have been repealed or modified by the States in a manner that comports with both federal and state law.

One critical misconception should be dispelled at the outset. The petitioners assert that the Tribes' position on the disclaimers would deprive the McCarran Amendment of any effect in the disclaimer states. *See, e. g.*, Montana Brief at 13, 20, 22-23; Arizona Brief at 12, 14, 16-17, 19. This is simply wrong. Without McCarran, the United States could not be joined without its consent in federal court water adjudication suits. *See* S. Rept. No. 757, 82d Cong. 1st Sess. 5 (1951). Effect can and should be given to both the disclaimers and the McCarran Amendment by holding that the McCarran Amendment's waiver of the sovereign immunity of the United States applies to federal court adjudications of the water rights of Montana's and Arizona's Indian tribes. *See Minnesota v. United States*, 305 U. S. 382 (1939).[2]

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[2]Petitioners and their supporting amici are also mistaken in suggesting that if the Tribes prevail the disclaimers will bar state court adjudications of the water rights of federal enclaves other than Indian reservations. *See, e. g.*, Montana Brief at i (Question No. 1), 12; Amici Brief of Colorado River Water Conservation District, et al., at 2-3. The disclaimers carefully differentiate between "unappropriated public lands" and "lands . . . owned or held by any Indian or by any Indian tribes."

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The principal issues encompassed within the disclaimer question presented in this case concern the meaning of the disclaimers and their relationship to the McCarran Amendment and to Public Law 280. The Tribes' analysis of the latter issue differs in several respects from the reasoning of the Court of Appeals for the Ninth Circuit. Those differences are summarized *infra* at 37-38.

A. Plain meaning and history of the disclaimers.

Like most states other than the original thirteen colonies, Montana and Arizona were permitted to join the Union by federal statutes that specified the terms of admission. The federal Enabling Acts for Montana and Arizona, reproduced *infra* at App. 1-3, 4-6, provided, and required the proposed states to enact binding ordinances stipulating, *inter alia*, that the people of the States:

(a) *"forever disclaim all right and title"* to all lands "owned or held by any Indian or Indian tribes . . .," *and*

(b) agree and declare that "until the title of such Indian or Indian tribes shall have been extinguished the same shall be and remain subject to the disposition and *under the absolute jurisdiction and control* of the Congress of the United States" (emphasis added).

Under the federal Enabling Acts, the required ordinances were made "irrevocable without the consent of the United States and the people of said State[s]. . . ." The Constitutions adopted by Montana and Arizona contain both

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Montana and Arizona disclaimed proprietary interest in both public lands and Indian lands, but the disclaimers of jurisdiction only apply to Indian lands. *See State v. Lohnes*, 69 N. W. 2d 508, 512 (N. Dak. 1955); *infra* at 15-16.

stipulations as well as the requirement that their revocation could not be accomplished without the consent of both the United States and the people of the States. *See infra* at 4, 7.

The plain language of the Enabling Acts flatly excludes state jurisdiction over Indian lands. The ordinary meaning of the word "land" encompasses water, Black's *Law Dictionary* 789 (5th ed.), and water rights are, in any event, interests in land. *See 1 Water and Water Rights*, § 53.1 at 345 (R. Clark ed. 1967).[3] Of course, the word "jurisdiction" "embraces every kind of judicial action." Black's *Law Dictionary* 766 (5th ed.). Nothing in the Act suggests there is an exception for state court adjudications of Indian claims to water on their land. On the contrary, the Acts provide that the jurisdiction and control of the federal government are absolute.

The plain meaning of the disclaimers is controlling, in the absence of exceptional circumstances. *American Tobacco Co. v. Patterson*, 102 S. Ct. 1534, 1537 (1982); *Howe v. Smith*, 452 U. S. 473, 480, 483 (1981). This Court has previously declined to give those disclaimers "an especially crabbed or restrictive meaning." *McClanahan v. Arizona Tax Comm'n.*, 411 U. S. 164, 176 (1973).[4]

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[3]*See also, Cappaert v. United States*, 426 U. S. 128, 138 (1976); Colorado River Water Conservation District v. United States, 424 U. S. 800, 805 (1976); United States v. District Court for Eagle County, 401 U. S. 520, 522-23 (1971); Arizona v. California, 376 U. S. 340, 343-45 (1964) (decree); 373 U. S. 546, 596-97 (1963).

[4]The Arizona petitioners argue that the disclaimers are inapplicable because they have nothing to do with claims held by the United States. Brief at 20-21. But the disclaimers do not differentiate between Indians, Indian Tribes, the United States, or other potential claimants. They simply provide that

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Congress did not require the disclaimer of jurisdiction over Indian lands capriciously or in an effort to punish the people of Montana and Arizona. Rather, it acted to discharge the nation's solemn, pre-existing treaty obligations to the Indians. The federally-imposed disclaimer provisions stem from peace treaties between the United States and Indian tribes in which the Indians agreed to submit to federal law and the United States agreed to assume exclusive jurisdiction and control over, and to be responsible for the protection of, reservation lands. For example, in the 1852 treaty with the Apache Nation, the Indians acknowledged and declared "that they are lawfully and exclusively under the laws, jurisdiction, and government of the United States" 10 Stat. 979. The language of the 1868 treaty with the Navajo Nation is less straightforward, but it too has been interpreted in light of its history and the traditional canons of construction to preclude extension of state law to Indians on the reservation. *See, e.g., McClanahan v. Arizona State Tax Comm'n.*, 411 U.S. 164, 173-75 (1973); *Williams v. Lee*, 358 U.S. 217, 220-22 (1959). *See also, Fisher v. District Court*, 424 U.S. 382, 386 (1976); *Rice v. Olson*, 324 U.S. 786, 789 (1945) ("The policy of leaving Indians free from state jurisdiction and control is deeply rooted in the Nation's history."); *The Kansas Indians*, 72 U.S. (5 Wall.) 737, 756 (1866); *United States v. Kagama*, 118 U.S. 375, 383-85 (1886); *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515, 557 (1832) ("The treaties and laws of the United States contemplate

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"Indian lands" shall remain under the absolute jurisdiction and control of the United States Congress. Since Montana's and Arizona's courts are purporting to exercise "jurisdiction" over "Indian lands," it is immaterial that the named defendant is the United States rather than an Indian or Indian tribe.

the Indian territory as completely separated from that of the states; and provide that all intercourse with them shall be carried on exclusively by the government of the union").

Thus, the common understanding in the 19th century was that Indian tribes entering into treaties with the United States were entitled to the protection of exclusive federal jurisdiction. Indeed, in many instances (including the reservations involved in this action), the lands reserved by treaty for an Indian tribe were not within any state that existed at the time. The unavailability of state jurisdiction was a natural consequence, and nothing suggested that the exclusivity of federal jurisdiction would terminate once states were created out of the territories surrounding the reservations.

Some uncertainty about that understanding was created by this Court's decision in *United States v. McBratney*, 104 U. S. 621 (1882). That case involved the murder of one non-Indian by another on the Ute reservation in Colorado. The question was whether the defendant could be tried in federal court. The Ute reservation had been created by treaty in 1868—a treaty very similar to the Navajo treaty of the same year. *Compare* 15 Stat. 619 with 15 Stat. 667. The Court recognized that the treaty contemplated only federal jurisdiction. 104 U. S. at 622, 624. But, the Court observed, when Colorado entered the Union eight years later, the Enabling Act did not explicitly reserve exclusive federal jurisdiction over the reservation. *Id.* at 623-24.[5] For this reason, the Court held, the reser-

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[5]Congress did not include in the Enabling Act for Colorado the kind of provisions reserving federal regulatory authority over Indians and Indian lands that had been included in several pre-1882 acts establishing territorial governments. See Memorandum for the United States on Petition for Writs of Certiorari at 13 n. 19; *McBratney, supra*, 104 U. S. at 623-24.

vation "is no longer within the sole and exclusive jurisdiction of the United States," and the federal courts have no jurisdiction to punish offenses committed on the reservation by non-Indians against non-Indians. *Id.* at 624. The opinion carefully added (*ibid.*) that the case did not present, and the Court did not decide, any question concerning

> the punishment of crimes committed by or against Indians, the protection of the Indians in their improvements, or the regulation by Congress of the alienation and descent of property and the government and internal police of the Indians.

McBratney thus established that federal jurisdiction over the Indian reservation was initially exclusive, but the case raised some doubt regarding the nature of federal jurisdiction over Indian affairs in the wake of Colorado's statehood. Both by its actual result and by its reservation of jurisdictional questions involving Indians and their lands, *McBratney* implied at least the possibility that the creation of new states would be held somehow to diminish federal jurisdiction over Indian lands or to render that jurisdiction concurrent with state power. *See also, Ward v. Race Horse,* 163 U. S. 504 (1896).[6]

Congress was apparently troubled by this possibility, and it chose not to leave the matter to judicial resolution. In authorizing the admission of new states after *McBratney,* Congress included in the relevant enabling acts the

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[6]Subsequent decisions of this Court have substantially limited, if not completely overruled, the role of the equal footing doctrine in determining the effect to be given to pre-existing Indian rights and immunities. See United States v. Winans, 198 U. S. 371, 382-84 (1905); F. Cohen, *Handbook of Federal Indian Law* 268 n. 73 (1982 ed.); *infra* at 46.

requirement that the new states disclaim all right and title to Indian lands and that they acknowledge absolute federal jurisdiction and control of such areas.

The federal disclaimer requirement in the now familiar form appeared in 1889 in the first Enabling Act passed after *McBratney*. The statute covered four proposed states, including petitioner Montana. 25 Stat. 677. The disclaimer in the 1910 Enabling Act for Arizona is virtually identical to the corresponding provision in the 1889 statute. Congress adopted these provisions to eliminate the uncertainty created by *McBratney*, to make clear that exclusive federal jurisdiction over Indian lands would not be affected by the admission of new states, and to fulfill the nation's treaty commitments to the Indians.

In short, it is clear from the language and history of the Enabling Act that Congress intended to—and did—prohibit Arizona and Montana from asserting jurisdiction over Indian claims to water on the reservation. Petitioners seek to avoid the plain meaning and clear history of the disclaimers in two principal ways, by limiting their applicability to proprietary matters and by contending that their force is overcome by the McCarran Amendment, 66 Stat. 560 (1952), 43 U. S. C. § 666, as construed in *Akin*. These contentions are examined and found wanting in the ensuing sections of this Brief.

B. The spurious distinction between "propriety" and "governmental" interests.

Notwithstanding their unequivocal language and clear historical purpose, petitioners argue that the federal disclaimer requirements were never intended to do anything

more than compel the new states to renounce any claims to Indian lands. Arizona Br. 24-32; Montana Br. 13-17. They argue that the federal disclaimers left the states free to regulate Indian lands and adjudicate Indian rights, as long as the states did not challenge the Indians' title to their lands. According to petitioners, the federal enabling acts sought to limit the "proprietary" or ownership interests that the states could assert, but not the "governmental" or regulatory interests. The spurious distinction advocated by petitioners will not withstand the most cursory analysis.

As noted above, the disclaimer requirements in the Montana and Arizona Enabling Acts contain two parts. First, the new states were required to disclaim all right and title to Indian lands. Second, they were required to agree in addition that such lands would remain under the "absolute jurisdiction and control" of Congress. *See Washington v. Yakima Indian Nation,* 439 U.S. 463, 479-80 (1979) (hereafter cited as *Yakima*). If the disclaimer provisions had been intended to affect only the States' "proprietary" interests, the second part of the Acts would have been superfluous. The first parts alone would have accomplished the limited purpose that petitioners attribute to Congress. *See American Textile Mfrs. Institute, Inc. v. Donovan,* 452 U.S. 490, 513 (1981); *Reiter v. Sonotone Corp.,* 442 U.S. 330, 338-39 (1979).

Moreover, the required disclaimer of "right and title" applies to both Indian lands and "unappropriated public lands . . . ;" on the other hand, the States' acknowledgement that Congress retains "absolute jurisdiction and control" applies only to Indian lands. Congress obviously differentiated between the Indian and public lands and

intended that states disclaim both proprietary and governmental interest in Indian lands.

Furthermore, immediately following these two clauses, the Enabling Acts contain a provision explicitly authorizing the new states to tax certain Indian lands, namely, "lands owned or held by any Indian who has severed his tribal relations. . . ." This limitation would not have been needed if the disclaimer itself did not apply to state governmental interests and did not thereby preclude state regulation and taxation of Indian lands. *See MacDonald v. United States,* 279 U. S. 12, 20-21 (1929). The language and structure of the disclaimers are thus inconsistent with petitioners' position.

So is the legislative history. Disclaimer provisions were included in the federal enabling acts in response to this Court's decision in *United States v. McBratney,* 104 U. S. 621 (1882). *See* the discussion *supra* at 12-14. That case was concerned solely with the division of jurisdiction between federal and state courts; it had nothing to do with state challenges to the ownership of Indian lands. Given this impetus for the disclaimers, it would be surprising, to say the least, if they dealt solely with state claims to title of Indian lands and had no bearing on the power of state courts to regulate and adjudicate matters relating to Indian lands. Petitioners' distinction between "proprietary" and "governmental" interests simply cannot be reconciled with Congress' intent in adopting the disclaimers, to confirm that the creation of new states would not affect the exclusivity of federal jurisdiction over activities on Indian lands.[7]

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[7]Even if the disclaimers were somehow limited to proprietary matters, this case satisfies that criterion. The adjudi-

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The foregoing textual and historical analysis is reinforced by this Court's decisions. The leading case is *McClanahan v. Arizona State Tax Comm'n.*, 411 U.S. 164 (1973), which involved the same Enabling Act, the same State Constitution, the same Tribe, and the same treaty that are involved in this case.

In unanimously holding that Arizona is precluded from imposing its personal income tax on Navajos on the reservation, the Court relied on the disclaimer as evidence of Congress' assumption that Arizona lacks jurisdiction over Navajos living on the reservation. 411 U.S. at 175. If petitioners' were correct in arguing that the disclaimers apply only to the states' "proprietary" interests, the disclaimers would have been irrelevant. Arizona's attempt to tax Indian income did not assert any claim to ownership of Indian land; it was, rather, a classic "governmental" activity that, according to petitioners' theory, should not have been affected by the dis-

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cation of Indian water rights involves one central issue: how much water was reserved and exempt from appropriation under state law in order to fulfill the purposes of the reservation? Winters v. United States, 207 U.S. 564, 577 (1908). *See also*, Cappaert v. United States, 426 U.S. 128, 138-39 (1976). Water that is not so reserved is subject to acquisition as a property right pursuant to state law. *See, e.g.*, California v. United States, 438 U.S. 645 (1978). Consequently, there is a significant proprietary dimension to these cases in which states and private parties are invoking the jurisdiction of state courts to enhance their property rights vis-a-vis those of the Indian tribes. *See* Arizona v. California, No. 8 Original, argued December 8, 1982. *See also*, Brief Amicus Curiae of the State of Wyoming at 9 n. 11. Permitting the courts of disclaimer states to exercise jurisdiction to determine the extent of Indian proprietary rights would therefore undermine the disclaimers' obvious protctive purpose and "drain them of all significance." *See* Wilson v. Omaha Indian Tribe, 442 U.S. 653, 665 (1979); Bryan v. Itasca County, 426 U.S. 373, 376 n. 2 (1976); Smith v. McCullough, 270 U.S. 456, 463-65 (1926).

claimers. *McClanahan* therefore reveals the flaws in petitioners' argument. *See also, United States v. Rickert*, 188 U. S. 432, 440-41 (1903) (state may not tax reservation lands allotted to individual Indians owing to the disclaimers as well as other laws).

Numerous other decisions of this Court have relied on the disclaimer provisions in holding that state courts lack jurisdiction over Indian affairs on the reservation. *See, e. g., Fisher v. District Court*, 424 U. S. 382, 386 & n. 8 (1976); *Williams v. Lee*, 358 U. S. 217, 220-23 & n. 10 (1959); *Williams v. United States*, 327 U. S. 711, 714 & n. 10 (1946). Like *McClanahan*, these decisions are inexplicable if, as petitioners contend, the disclaimers are limited to the states' "proprietary" interests.

Congress too has manifested its understanding that the enabling act disclaimers apply to state governmental actions and, in particular, to state court jurisdiction over Indian matters. In 1953, Congress expressly authorized disclaimer states to assume limited civil and criminal jurisdiction over reservation Indians.[8] Section 6 of Pub. L. 280 announced that the United States would consent to state jurisdiction "[n]otwithstanding the provisions of any Enabling Act for the admissioin of a State" (67 Stat. 588). If the enabling act disclaimers were not "legal impediment[s]" to the assumption of state jurisdiction over Indians on the reservation, § 6 of Pub. L.

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[8]The statute made an explicit exception prohibiting state court adjudication of the ownership or right to possession "of any real or personal property, including water rights, belonging to any Indian or Indian tribe, band, or community that is held in trust by the United States. . . ." This exception for property and water rights adjudication would not have been necessary if Pub. L. 280 and the disclaimers did not encompass state court jurisdiction.

280 would have been unnecessary. Enactment of the statute thus showed that Congress understood that the courts of disclaimer states lacked the power to decide cases involving reservation Indians without the consent of the United States. *See* H. R. Rep. No. 848, 83d Cong., 1st Sess. 6 (1953), quoted in *Yakima*, 439 U. S. at 481 n. 25; unpublished legislative history of Pub. L. 280 described in *Yakima*, 539 U. S. at 491 & n. 36; 99 Cong. Rec. 10782 (1953). Similarly, *Yakima*, which held that there are no federal requirements affecting the manner in which states must modify their disclaimers in order to acquire the jurisdiction offered by Section 6 of Pub. L. 280, would have been a useless exercise if the disclaimers were limited to proprietary matters.[9] Thus, Congress, the disclaimer states, and this Court have all recognized that the Indian disclaimers are obstacles to the assumption of state court jurisdiction over Indian country.

In attempting to contervail the language and history of the disclaimer provisions, the dispositive decisions of this Court, and the evidence of Congressional understanding provided by Pub. L. 280, petitioners cite three principal cases, none of which supports their position. Arizona Br. at 25-28; Montana Br. at 13-14. Two of the cases, *Mescalero Apache Tribe v. Jones*, 411

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[9] In *Yakima*, Washington asserted that its constitutional disclaimer does not affect state jurisdiction over *fee* lands within the reservation. *See* 439 U. S. at 484 n. 28 (issue noted but not considered by the Court). But Washington never questioned the necessity for modifying its disclaimer in order to obtain jurisdiction over reservation trust or restricted lands held by Indians or Indian tribes. Other states have also taken affirmative action to overcome the effect of their organic law disclaimers of jurisdiction. *See Yakima*, 439 U. S. at 486 n. 29. Montana's legislature, governor, and Supreme Court have recognized that its constitutional disclaimer is an impediment to state court jurisdiction. *See* State ex rel. McDonald v. District Court, 159 Mont. 156, 496 P. 2d 78 (1972).

U. S. 145 (1973), and *Organized Village of Kake v. Egan*, 369 U. S. 60, 69 (1962), involved state jurisdiction over Indian activities *outside* the reservations. The third, *Draper v. United States*, 164 U. S. 240 (1896), involved *non-Indian* activities on a reservation.

Indeed, this Court has previously disposed of petitioners' argument. In *McClanahan v. Arizona Tax. Comm'n., supra*, the Court expressly distinguished *Organized Village of Kake v. Egan, supra*, on the ground that it did not involve a reservation and therefore does "not purport to provide guidelines for the exercise of state authority in areas set aside by treaty for the exclusive use and control of Indians." 411 U. S. at 176 n. 15.[10] *See also Donnelly v. United States*, 228 U. S. 243, 271-72 (1913) (distinguishing *Draper* as inapplicable to crimes committed by or against Indians); *Chino v. Chino*, 90 N. M. 204, 561 P. 2d 476 (1977) (recognizing that *McClanahan* had narrowed the applicability of *Kake Village* to non-reservations settings).[11]

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[10]In Metlakatla Indian Community v. Egan, 369 U. S. 45, 57-59 (1962), a companion case to *Kake Village* decided on the same day, the Court held that the Alaska Statehood Act disclaimer preserves federal authority and jurisdiction over Indian property located within reservations.

The Arizona petitioners also rely on Puyallup Tribe v. Washington Department of Game, 433 U. S. 165 (1977). But that case involved activities on fee lands that were no longer owned by Indians and did not mention or refer to the disclaimers. In addition, the Court held that Washington's limited authority over Indian fishing was derived from the Treaty between the United States and the Tribe in which the Tribe agreed to share the fishery "in common with all citizens of the Territory." 433 U. S. at 175-77.

[11]In *Kake Village*, the Court relied on the unique legislative history of the 1959 Alaska Statehood Act. *See* 369 U. S. at 65, 68-71. In contrast to that history, the House Committee Report on the 1889 Enabling Act for Montana and three other

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Petitioners have cited no decision of this Court that deals with state court jurisdiction over Indian land or water disputes. None of the cases on which they rely supports their contention that the disclaimer provisions do not affect state court jurisdiction but concern only the states' "proprietary" interest in Indian lands.

C. The McCarran Amendment and the disclaimers.

Petitioners claim that the McCarran Amendment somehow avoids or undermines the effect of the disclaimers so as to permit Montana's courts to exercise jurisdiction over the adjudication of water rights appurtenant to the trust lands of individual Indians and Indian tribes. Although petitioners carefully avoid couching their arguments in these terms, their reliance on the McCarran Amendment to overcome the disclaimers must ultimately be predicated on establishing a repeal by implication. *Cf. TVA v. Hill*, 437 U. S. 153, 191 (1978) (rejecting effort to establish exception to the general rule against implied repeals).

The argument is erroneous. It reads far more into the Amendment than Congress ever said or intended. And it does not satisfy the criteria for finding an implied repeal.

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states describes the disclaimer as providing that the Indian reservations in the Dakota Territory "are excluded from the jurisdiction of the proposed state . . . and remain within the exclusive control and jurisdiction of the United States." H. R. Rep. No. 1025, 50th Cong. 1st Sess. 8-9 (1888), partially quoted in *Yakima*, 439 U. S. at 488 n. 31. *See also*, H. R. Rep. No. 848, 83d Cong. 1st Sess. 8 (1953), reprinted in 1953 U. S. Code Cong. & Admin. News 2409, 2414. (Effect of unrepealed disclaimer is to retain "exclusive" federal jurisdiction until Indian title is extinguished.)

1. *The McCarran Amendment and Congressional Intent.*

Enacted in 1952, the McCarran Amendment is a simple, clear, narrow statute. It waives the sovereign immunity *of the United States* "in any suit . . . for the adjudication of rights to the use of water of a river system or other source." 43 U. S. C. 666. The Amendment does not mention Indians, Indian tribes, Indian reservations, or Indian water rights. It does not refer to or purport to modify disclaimer provisions in federal enabling acts or state constitutions. It does not mention or purport to affect the subject matter jurisdiction of any court. Surely if Congress had intended to revoke or repeal provisions in numerous federal statutes, to change significantly the allocation of power between federal and state courts, and to rescind unilaterally the provisions of numerous Indian treaties, it would have done so explicitly rather than through the cryptic device of a waiver of the United States' sovereign immunity.

Subsequent legislative enactments make it clear that Congress had no such intention. In 1953, barely a year after passage of the McCarran Amendment, Congress enacted Public Law 280, a comprehensive statute designed, *inter alia*, to prescribe the procedure by which disclaimer states could assume certain civil and criminal jurisdiction over Indian lands. 67 Stat. 588, reproduced *infra* at App. 9-13. Congress was careful to specify, however, that the jurisdiction made available by Pub. L. 280 did not include the power to adjudicate the ownership of "any real or personal property, including water rights, belonging to any Indian or any Indian tribe." If Congress, through the McCarran Amendment, had conferred that power on disclaimer states only one year earlier, Congress would hardly have taken such pains to exclude

it from Public Law 280. *See, e.g., Bryan v. Itasca County*, 426 U.S. 373, 386-87 (1976).

Likewise, in the Indian Civil Rights Act of 1968, Congress again excluded the power to adjudicate Indian water rights from the civil jurisdiction that disclaimer states were permitted to assume. 25 U.S.C. 1322(b). Congress thus once again manifested its belief that the McCarran Amendment had not already granted such jurisdiction to state courts in disclaimer states.

Petitioners argue, however, that the McCarran Amendment was intended to permit complete adjudications of water rights in state courts. That purpose, they say, could be accomplished only if state courts are permitted to adjudicate Indian water rights. Hence, the argument runs, Congress must have intended—via the McCarran Amendment—to overcome the disclaimer provisions of the enabling acts. Arizona Br. 14-24; Montana Br. 20-23. The simple fact, though, is that Congress did not address Indian rights when it enacted the McCarran Amendment. Nor did Congress mention or give any thought to the enabling acts' disclaimers.

Although the legislative history of the McCarran Amendment is sparse, its most salient feature for present purposes is clear. References to Indian rights were exceedingly scarce, and references to disclaimer provisions were non-existent.

Although eventually enacted as part of the 1953 Department of Justice Appropriation Act (66 Stat. 549, 560), the McCarran Amendment was initially introduced as a separate bill at the opening of the 82d Congress. The bill waived the sovereign immunity of the United States in the same terms ultimately enacted. S. 18, 82d Cong., 1st Sess. (1951). *See* 97 Cong. Rec. 86 (1951).

At no time during the legislative consideration of the McCarran Amendment did any Member of Congress sug-

gest that the Amendment concerned state court adjudication of reserved Indian water rights. Much less did any Member (or anyone else) ever intimate that the Amendment was intended to override disclaimer provisions in federal enabling acts or state constitutions. Indeed, as far as we have been able to determine, the words "disclaimer" and "enabling acts" were never once uttered by anyone in the course of congressional action on the McCarran Amendment.

Neither the Report of the Senate Judiciary Committee (S. Rep. No. 755, 82d Cong. 1st Sess. (1951)), nor the remarks of Senator McCarran explaining the bill (97 Cong. Rec. 12947-12948 (1951)) gave the slightest hint that the legislation involved Indian rights or disclaimers. In reviewing the reasons for the bill, the Senate Report did not mention the reserved rights doctrine of *Winters v. United States, supra,* and its application to Indian reservations.[12]

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[12]In 1952, the nature and scope of Indian reserved rights were uncertain. For example, prior to Arizona v. California, 373 U. S. 546, 595-601 (1963), this Court had not quantified the full extent of any Indian reservation's water rights and had not determined the applicability of the reserved rights doctrine to Indian reservations established by statutes or executive orders. *See* Sondheim & Alexander, "Federal Indian Water Rights: A Retrogression to Quasi-Riparianism?" 34 So. Cal. L. Rev. 1 (1960); *Water Policies for the Future: Final Report to the President and to the Congress of the United States by the National Water Commission* 481-82 (1973).

The McCarran Amendment was enacted prior to the decisions in Arizona v. California, 373 U. S. 546, 601 (1963); and FPC v. Oregon, 349 U. S. 435 (1955), which first suggested and then held, that the reserved rights doctrine applied to federal enclaves other than Indian reservations. Prior to those decisions, the reserved rights issue had not captured the attention of the Congress or the western states. *See* Cappaert v. United States, 426 U. S. 126, 144-45 (1976) (describing legislative efforts subsequent to the 1955 decision in FPC v. Oregon, *supra,* to subject some federal water uses to the state law of prior appropriation). It is hardly surprising, then, that reserved rights

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Not a word was uttered on the floor of either house to indicate that Indian rights were included in the United States' consent to suit or that disclaimers were affected by the legislation.[13]

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in general and Indian reserved rights in particular received scant attention in the legislative history of the McCarran Amendment.

At the time that the McCarran Amendment was being considered, the most controversial water rights case involving the United States involved a claim for the Camp Pendleton Marine Corps Base in Southern California. *See* 98 Cong. Rec. 3556, 3562-63 (1952); Hearings on S. 18 Before a Subcommittee of the Senate Committee on the Judiciary, 82d Cong. 1st Sess. 37-44 (1951). The Government's claims in that case were predicated entirely on state law. *See* United States v. Fallbrook Public Utility District, 347 F. 2d 48 (9th Cir. 1965). Subsection (d) of the McCarran Amendment, uncodified, reproduced *infra* at App. 9, prohibited the expenditure of any Justice Department appropriations for that suit. *See Akin, supra,* 424 U. S. at 807. *See also,* Fallbrook Public Utility District v. U. S. District Court, 202 F. 2d 942 (9th Cir. 1953). By contrast, Congress' attention was not focused on or directed to any suit or controversy involving Indian reserved water rights.

[13]One question concerning Indian rights (but not disclaimers) was asked on the Senate floor, but it referred to a section of the bill other than the waiver of sovereign immunity. The Senate Judiciary Committee, in response to a suggestion from Senator Magnuson, added a provision requiring the Secretary of the Interior to maintain a complete catalogue of all water rights claimed by any federal department, agency, or corporation. S. Rep. No. 755, *supra,* 1-2, 6-7. (This provision was dropped from the version of the bill that was ultimately enacted. *See* 98 Cong. Rec. 7893 (1952).) After Senator McCarran explained the Committee's bill, Senator Chavez of New Mexico asked specifically whether Indian water rights held in trust by the United States would be included *in the proposed catalogue*. Senator McCarran seemed to answer negatively. 92 Cong. Rec. 12948 (1951). The complete colloquy was as follows:

> MR. CHAVEZ. I am happy the Senator from Nevada has made a statement explaining the purpose of the bill and the reasons for it. I have no objection to the bill. I know what it means to my State. But I should like to ask a question. If the Interior Department is made the repository

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Petitioners nonetheless insist that their tortured reading of the statute is supported by statements made to the Senate by two government officials who opposed the bill, William H. Veeder, a Special Assistant to the Attorney General, and Acting Assistant Secretary of the Interior White. *See* Senate Hearings, *supra*, at 6-7, 67-68; S. Rep. No. 755, *supra*, at 9. Neither of these fragmentary remarks deal with the disclaimer issue.[14] These brief refer-

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of water rights, be they in the United States Government or in individual citizens, does that mean that Indian rights will also be integrated?

MR. McCARRAN. No. All that the bill provides is that the Interior Department shall be a repository for the rights that have been acquired and are held by the United States, so that one seeking to determine water rights on a given stream may know what rights, if any, are claimed by the Government.

MR. CHAVEZ. Does the Government claim those rights as the Government, or could it act as trustee, let us say, for a tribe of Indians?

MR. McCARRAN. It could act as a trustee, I suppose. But, Mr. President, there is a deeper and more far-reaching purpose. If my time has not expired—

THE PRESIDING OFFICER. The time of the Senator has expired.

Thus, the only reference to Indian rights by any Member of Congress during the legislative consideration of the McCarran Amendment focused on a provision that did not even pass. It did not involve state court jurisdiction or the repeal of any disclaimer.

[14]The only other references to Indian rights (but not disclaimers) in the Senate hearings are not relevant here. On one occasion, Mr. Veeder mentioned Indian rights in the course of discussing the meaning of the interstate compact among the states on the Colorado River. Senate Hearings, *supra*, at 12-13. The other reference appears in the prepared statement of the Nevada Attorney General (*id.* at 47-48). His comment concerned litigation involving water rights that were derived from state law and had been purchased by the United States and were being used by the Bureau of Indian Affairs of the Department of the Interior.

ences to Indians in the legislative history, which were cited in *Akin*, 424 U. S. at 811-12, may show that Indian water rights were not completely overlooked,[15] but they surely do not elevate Congress' concern about Indians to anything more than an afterthought.

Even if the meager evidence in the Amendment's legislative history is sufficient to support the outcome in *Akin*, it cannot sustain the far greater burden that petitioners now ask it to bear. Determination of the breadth of the United States' consent to suit is one thing, but implied repeal or revocation of several federal disclaimer statutes is something else altogether.

2. *Implied Repeal.*

Since the McCarran Amendment does not mention or allude to the disclaimers, petitioners must depend on establishing an implied repeal. The applicable criteria were recently restated in *Kremer v. Chemical Construction Corp.*, 102 S. Ct. 1883, 1890 (1982):

> There are . . . 'two well-settled categories of repeals by implication —(1) where provisions in the two acts are in irreconcilable conflict, the later act to the extent of the conflict constitutes an implied repeal of the earlier one; and (2) if the later act covers the whole subject of the earlier one and is intended as a substitute, it will operate similarly as a repeal of the earlier act. But, in either case, the intention of the legislature to repeal must be clear and manifest.'

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[15]For a critique of the Court's reliance on the legislative history to support its conclusion in *Akin*, see Abrams, "Reserved Water Rights, Indian Rights, and the Narrowing Scope of Federal Jurisdiction: The *Colorado River* Decision," 30 Stan. L. Rev. 1111, 1117-18 (1978). The general rules are that courts should not rely on the views of legislative opponents, NLRB v. Fruit Packers, 377 U. S. 58, 66 (1964), and should be "extremely wary" of attaching importance to isolated bits of testimony in committee hearings, S & E Contractors, Inc. v. United States, 406 U. S. 1, 13 n. 9 (1972).

> Radzanower v. Touche Ross & Co., 426 U. S. [148] at 154 [1976], quoting Posadas v. National City Bank, 296 U. S. 497, 503 (1936).

Kremer described these requirements as imposing a "difficult test" and a "rigorous standard." 102 S. Ct. at 1891 n. 8 and 1892 n. 10. *See also, TVA v. Hill,* 437 U. S. 153, 189 (1978); *Radzanower v. Touche Ross & Co.,* 426 U. S. 148, 154 (1976); *Morton v. Mancari,* 417 U. S. 535, 550 (1974) ("In the absence of some affirmative showing of an intention to repeal, the only permissible justification for a repeal by implication is when the earlier and later statutes are irreconcilable.")

The second basis articulated in *Kremer* for finding an implied repeal—when the second act covers the whole subject of the earlier one and is clearly intended as a substitute—is obviously inapplicable. At most, the McCarran Amendment's waiver of the government's sovereign immunity in water adjudication suits covers only one of the multitude of subjects encompassed in the Indian jurisdictional disclaimers. *See, e. g.,* cases cited *supra* at 17-18. No one claims that McCarran is a complete substitute for the disclaimers.

Petitioners' argument for an implied repeal is therefore reduced to a claim that the McCarran Amendment and the disclaimers are in irreconcilable conflict and that the later statute, McCarran, controls. But the Tribes' sole claim is that Montana's jurisdictional disclaimer precludes the adjudication of Indian water rights in disclaimer state courts. The disclaimers and the McCarran Amendment would be in irreconcilable conflict only if the McCarran Amendment is construed to mandate the adjudication of Indian water rights in those state courts. But *Akin* expressly and unanimously rejected that contention in holding that the McCarran Amendment did not impliedly repeal federal court jurisdiction over water adjudication

suits initiated by the United States pursuant to 28 U. S. C. § 1345. 424 U. S. at 806-09 (nothing in the Act or its legislative history indicates an intent to diminish federal district court jurisdiction.) *See also,* S. Rep. No. 755, 82d Cong. 1st Sess. 5 (1951). That holding was followed and applied in *Cappaert v. United States,* 426 U. S. 128, 145 (1976). *See also, New Mexico v. Aamodt,* 537 F. 2d 1102 (10th Cir. 1978), *cert. denied,* 429 U. S. 1121. Since McCarran does not compel state court adjudications of Indian rights, there is no conflict, irreconcilable or otherwise, between that statute and the disclaimers. Effect can easily be given to both laws.[16]

Assuming *arguendo* that legislative history may be consulted to establish the requisite intent for an implicit repeal,[17] the absence of any mention of the disclaimers in the legislative history of the McCarran Amendment is also significant. It is difficult, if not impossible, to establish

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[16]There is another canon of construction that deserves brief mention, that a specific statute will not be controlled or nullified by a general one regardless of the priority of enactment. *See* Morton v. Mancari, 417 U. S. 535, 550-51 (1974). This rule is difficult to apply in the context of this case. The disclaimers are more specific in that they deal with state jurisdiction over Indians, whereas McCarran does not mention Indians and applies to adjudications of all water rights owned by the United States. On the other hand, McCarran specifically applies to water adjudication suits, whereas the disclaimers preclude states from exercising jurisdiction over a broader array of activities. The McCarran Amendment might be more specific if it were construed to *require* that Indian water rights be adjudicated in the state courts. But as we have seen, the ultimate resolution of the implicit repeal question turns on the identical issue. Hence, in the context of this case, the canon favoring specific statutes over general ones merges with the rule for determining whether there has been an implicit repeal. The application of both canons therefore leads to the conclusion that the disclaimers have not been displaced by the McCarran Amendment.

[17]Ordinarily, the irreconcilable conflict must be evident from the language or operation of the two statutes. Kremer v. Chemical Construction Co., *supra,* 102 S. Ct. at 1892.

a "clear and manifest" intent to repeal provisions of statutes to which Congress devoted absolutely no attention. This is especially true in the context of Indian-state relations in which "some mention would normally be expected if such a . . . change . . . had been contemplated by Congress." *Bryan v. Itasca County*, 426 U. S. 373, 382 (1976). Moreover, it would be highly unusual, and not in keeping with "the overriding duty of our Federal Government to deal fairly with Indians," for Congress to have repealed the disclaimers and subjected Indian water rights to the jurisdiction of disclaimer state courts without providing the affected Indian tribes with an opportunity to present their views. *Santa Clare Pueblo v. Martinez*, 436 U. S. 49, 70 n. 30 (1978).

The Arizona petitioners also seek to avoid the strictures against implied repeals by maintaining that Indian lands remain subject to Congress' absolute jurisdiction and control because the McCarran Amendment was an exercise of this congressional power. Br. at 21-22. This contention simply begs the critical questions, whether the McCarran Amendment was intended to overcome the force of the disclaimers, *i.e.*, to repeal them by implication, and whether effect can be given both to McCarran and the disclaimers. The governing rules are turned on their head by the suggestion (Br. at 22 n. 26) that the absence of an explicit repeal of the disclaimers in the McCarran Amendment suggests that a repeal was intended. If that were true, repeals by implication would be the rule rather than the exception and the explicit repeal of the Enabling Act disclaimers in Section 6 of Pub. L. 280 would have been entirely superfluous.

3. *Other Laws.*

The Arizona petitioners purport to have identified several federal statutes that have extended state author-

ity to Indian reservations without repealing or authorizing the repeal of the federal and state disclaimers. Br. 22-24. But most of the cited statutes do not purport to subject Indians to the coercive jurisdiction of state courts without their consent and the ones that do are not affected by the disclaimers.

25 U. S. C. § 311 simply permits the Secretary of the Interior, acting as the Indians' trustee, to allow state officials to open and establish highways on Indian lands "upon compliance with such requirements as [the Secretary] may deem necessary." The states have no authority to act on their own. Similarly, 25 U. S. C. § 231 authorizes the Secretary to permit state officials to enforce their sanitation, quarantine, and compulsory school attendance laws on Indian reservations "under such rules and regulations as [the Secretary] may prescribe." Again, the states may not act on their own. Moreover, such enforcement is also made subject to the consent of the tribal governing body of the reservation.

The statutes permitting state taxation of minerals produced on Indian reservations, 25 U. S. C. §§ 398 and 398c, authorize tribes to enter into mineral leases and then permit the states to tax the output of non-Indian lessees. *Compare Agua Caliente Band of Mission Indians v. County of Riverside*, 442 F. 2d 1184 (9th Cir. 1971), *cert. denied*, 405 U. S. 933 (upholding state taxation of non-Indian lessees' interests in the absence of a statute). All these laws condition the states' involvement on the voluntary acts of the federal government or the tribes and do not subject Indians and their lands to unwanted and coercive state court jurisdiction.

Similarly, the Arizona petitioners' reliance on the federal liquor law, 18 U. S. C. § 1161, is misplaced. The consent of the tribes is required before state law may be

applied to the sale of liquor on an Indian reservation. In addition, an uncodified provision of that statute (67 Stat. 586 (1953)) expressly consented to the repeal of the strict prohibitions on sales of intoxicants to Indians contained in the Constitutions of Arizona and New Mexico.

25 U. S. C. § 357 authorizes extinguishment of Indian title by condemnation actions initiated by state or local authorities. But the condemnation actions authorized by this statute must be brought against the United States in the federal court. *Minnesota v. United States*, 305 U. S. 382 (1939).

The only statutes cited by the Arizona petitioners that subject Indians to the coercive jurisdiction of state courts are provisions of recent laws creating new Indian reservations. 25 U. S. C. § 761 *et seq.* (Utah Paiutes), 1300f *et seq.* (Pascua Yaqui). The lands that are the subject of the jurisdiction conferred by these statutes were in private ownership at the time of their enactment.[18] They are therefore outside the scope of protection afforded by the disclaimers, which only apply to lands held by Indians at the time of statehood. *Organized Village of Kake v. Egan, supra*, 369 U. S. at 64-65.[19]

Further, all of the cited statutes deal specifically and exclusively with Indian affairs. None of them confer

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[18]The disclaimers expressly reserve the right of the United States to extinguish Indian title. Once that has been done, there are no obstacles to the imposition of any jurisdictional arrangements.

[19]Unlike the McCarran Amendment, the Utah Paiute and Pascua Yaqui statutes do not subject "Indian lands" to coercive state court jurisdiction. They simply make the jurisdiction conferred by Pub. L. 280 applicable to the new reservations. But that jurisdiction specifically excludes matters involving the regulation, alienation, taxation, or adjudication of Indian property, including water rights. Sections 2 (b) and 4 (b) of Pub. L. 280, 18 U. S. C. § 1162 (b), 28 U. S. C. § 1360 (b). See *supra* at 16-17, n. 7.

power over Indians by implication. In this respect they are unlike the McCarran Amendment, which applies generally to all water rights claimed by the United States, does not mention Indians, and does not expressly confer any power over Indians. It is one thing to say that the force of the disclaimers is overcome by a statute that explicitly grants the states a limited role in Indian affairs;[20] it is quite another to conclude that the rights and immunities expressly guaranteed by the disclaimers are implicitly repealed by a statute that simply waives the sovereign immunity of the United States.

In short, the statutes on which petitioners rely do not support the proposition that the McCarran Amendment overrides the express disclaimers of jurisdiction over Indian lands. None of those statutes purports to impose coercive state court jurisdiction over Indian lands that are protected by the disclaimers. And unlike the McCarran Amendment, all of the cited statutes deal expressly with various aspects of state-Indian relations.

In addition to the material differences between the statutes cited by the Arizona petitioners and the McCarran Amendment, their argument is beside the point. The Tribes do not contend that an explicit repeal of the enabling act disclaimers, such as that contained in Section 6 of Pub. L. 280, is always necessary. Rather, the issue turns on Congress' intent when it enacts a statute that does not explicitly repeal the disclaimers. *See* F. Cohen, *Handbook of Federal Indian Law*, 374 n. 229 (1982 ed.). Petitioners have made no effort to satisfy the minimal criteria required for an implicit repeal. Still less they have overcome the greater burden required to

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[20]We do not know of any decision of this Court that has considered the relationship between any of these statutes and the disclaimers.

establish repeal of a provision of a "compact" between sovereigns, *see Yakima*, 439 U. S. at 479-81 and n. 24; *infra* at App. 4, that is expressly made "irrevocable without the consent of the United States and the people of said State[s]" and that was partially revoked by an explicit statute only a year later.[21]

Courts are not at liberty to pick and choose between the two statutes in the manner suggested by the petitioners when they are capable of co-existence. *Morton v. Mancari, supra*, 417 U. S. at 551.

There is no affirmative showing in the McCarran Amendment of an intent to repeal the disclaimers. Since effect can be given to both statutes by holding that the McCarran Amendment's waiver of immunity for the adjudication of Indian rights in the disclaimer states is limited to suits in the federal courts, petitioners cannot meet their burden for establishing an implied repeal. *Morton v. Mancari, supra*, 417 U. S. at 549-51; *Minnesota v. United States*, 305 U. S. 382 (1939). Accordingly, the Enabling Act disclaimers continue to stand as effective barriers to the adjudication of Indian water rights in the state courts of Montana and Arizona.

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[21]On its face, the disclaimer needs the consent of both parties to change jurisdictional arrangements concerning Indian lands. Further, the enactment of Pub. L. 280 only a year after McCarran "is cogent proof that Congress knew well how to express its intent directly when that intent" was to abrogate Indian rights or to modify the disclaimers. *Yakima*, 439 U. S. at 478 n. 22; Bryan v. Itasca County, 426 U. S. 373, 389-90 (1976). McCarran and Pub. L. 280 are in *pari materia;* taken together they reveal an intent not to modify or repeal the disclaimers to permit state court adjudications of Indian water rights. *See* United States v. Mitchell, 445 U. S. 535, 542 (1980); Bryan v. Itasca County, *supra*, 426 U. S. at 390; Menominee Tribe v. United States, 391 U. S. 404, 411 (1968). To the extent that there are any ambiguities in the McCarran Amendment, they should be resolved in the Indians' favor and in a manner that will not result in implicit abrogation of important Indian rights and immunities. Wilson v. Omaha Indian Tribe, 442 U. S. 653, 666 (1979); Bryan v. Itasca County, *supra*, 426 U. S. at 392-93; Winters v. United States, 207 U. S. 564, 576, 577 (1908).

D. The State constitution.

Even if, contrary to all that we have said, the McCarran Amendment removed the federal Enabling Act disclaimers as obstacles to state court jurisdiction over Indian water rights, questions would remain concerning the effect of the disclaimers in the Montana and Arizona Constitutions. Since the federal Enabling Acts as well as the States' Constitutions provide that the disclaimers are irrevocable without the consent of both the United States *and* the people of the states, the States' constitutional disclaimers are separate and independent barriers to the assumption of state jurisdiction over Indian lands. *See also,* Section 6 of Pub. L. 280, *supra*; *Yakima, supra; State v. Lohnes,* 69 N. W. 2d 508, 517 (N. D. 1955).

The lower courts did not address the question whether the constitutional disclaimers have been modified or repealed by the Montana or Arizona statutes governing general stream adjudications. One would ordinarily expect that the state constitutional disclaimers could be changed only through the affirmative action prescribed by Arizona and Montana law for constitutional amendments. The Court of Appeals remanded the case for resolution of this issue, and it has not been briefed by the petitioners in this Court.[22] In these circumstances, it would not be appropriate for this Court to resolve this issue of state law.[23]

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[22]The problem is noted and cavalierly brushed aside by the Montana petitioners. Br. at 14 n. 17.

[23]Petitioners have not explicitly argued that the McCarran Amendment removes the necessity for any action by the States to overcome their Constitutional impediments. There is certainly nothing on the face of the statute or in its history that lends any weight to such a construction. The courts obviously would strain hard not to attribute that intent to Congress and thereby avoid reaching that difficult federal constitutional issue. See FERC v. Mississippi, 102 S. Ct. 2126, 2145 n. 4 (1982) (Powell, J. concurring and dissenting); National League of Cities v. Usery, 426 U. S. 833 (1976).

There is also a related question of federal law that would arise if state legislative action is held sufficient to repeal or modify the constitutional disclaimers as a matter of state law. *Yakima, supra,* 439 U. S. at 478-93, held that that state legislative action was sufficient to satisfy the federal requirement for state consent under Section 6 of Pub. L. 280. As the Court observed in *Yakima,* however, Pub. L. 280 was intended to facilitate partial repeal of the disclaimer provisions so that the states could more easily assume the limited jurisdiction offered by the Act. It relaxed previous federal requirements for the revocation of the disclaimers. But Yakima expressly left open the question of whether the phrase "consent of the people" in the federal enabling acts precludes obtaining the requisite consent by legislative action. 439 U. S. 487-88 & n. 31.

Here, as petitioners concede, Arizona Br. 32-33; Montana Br. 17-20, Arizona and Montana cannot obtain jurisdiction over Indian water rights under Pub. L. 280. They must do so, if at all, in a manner that is consistent with the requirements of their federal Enabling Acts.

Petitioners have not explained why action of the state legislatures should be effective to grant the consent of the people required by the Enabling Acts. The federal statute required the state disclaimer to be placed in the state constitution; it presumably did so to ensure that the provision would be permanent, unless changed by the ordinary amending process. No such amendment has occurred here. This issue of federal law also would remain for determination even if it is concluded that the federal enabling act barriers have been removed by the McCarran Amendment and that the Montana and Arizona

water adjudication statutes have overcome the state Constitutional impediments.

E. The Court of Appeals' decision and Public Law 280.

The Crow Tribe agrees with the Ninth Circuit's conclusion that the distinction between disclaimer and non-disclaimer states must be recognized in considering the effect of the McCarran Amendment. It disagrees, however, with that court's apparent conclusions that the federal Enabling Act bar to the assumption of state jurisdiction has been overcome by Pub. L. 280 and that Pub. L. 280 grants the consent of the United States to the amendment of the states' constitutional disclaimers to permit state court adjudication of Indian water rights. Since Pub. L. 280 expressly excludes the adjudication of Indian water rights from its coverage, 28 U. S. C. § 1360(b), 25 U. S. C. § 1322 (b), reproduced *infra* at App. 12, 15, Section 6 of that Act has no effect on the acquisition of such jurisdiction.[24] For the same reason, the requirement of tribal consent imposed by the 1968 amendment to Pub. L. 280, 25 U. S. C. § 1322 (a), has no bearing on the outcome of this case. Because jurisdiction over water suits is not affected by the repeal of the enabling act disclaimers in Pub. L. 280, and *Yakima* leaves open the question whether the federal enabling acts preclude amendment of state constitutional disclaimers by legislative action (*see supra at* 36-37), the Tribes also disagree with the Ninth Circuit's

[24]Section 6, reproduced *infra* at App. 13, partially repeals the Enabling Act barrier and grants the consent of the United States to the amendment of state Constitutional disclaimers for the limited purpose of "remov[ing] any legal impediment to the assumption of civil and criminal jurisdiction *in accordance with the provisions of this Act.*" Emphasis added. Since adjudication of water rights is excluded from the jurisdiction conferred by Pub. L. 280, Section 6 of that Act has no effect on the Enabling Act and state Constitutional prohibitions on adjudicating Indian water rights in the courts of the disclaimer states.

conclusion (Mont. Pet. App. 32-33) that the validity of repeals of the state disclaimers must be determined solely by reference to state law.

II.

The Disclaimers Do and Should Make a Difference.

Ordinarily the inquiry would end here. If the disclaimers bar state court adjudications of Indian water rights and have not been expressly or implicitly repealed, it seemingly follows that other considerations are irrelevant and that Indian water rights must be decided in the federal courts. *See e.g., Rubin v. United States,* 449 U.S. 424, 430 (1981); *Aaron v SEC,* 446 U.S. 680, 695 (1980).

But in this case an argument is made that the disclaimers should be ignored or regarded as entirely superfluous for reasons of policy or practicality. The proponents of this position, most notably the United States, start from the *Akin* holding that the McCarran Amendment authorized the courts of non-disclaimer states to adjudicate Indian water rights, and conclude that Indian reservations in the disclaimer states should receive the same treatment. *See* Memorandum for the United States on Petitions for Writs of Certiorari, hereafter cited as United States Memorandum, at 12-16. Notwithstanding its acknowledgments that the Tribes' position "is not without force," that the disclaimers "generally insulate Indian Reservation affairs from the jurisdiction of State authorities," and that the Tribes would prevail under "the usual rules of construction" United States Memorandum at 9-12, the government nevertheless concludes

that "intolerable tension" results from applying different rules to disclaimer and non-disclaimer states.[25]

Unlike the petitioners, however, the United States ultimately recognizes that displacement of the disclaimers must be predicated on an "implied remov[al of] the Enabling Act impediments" by the McCarran Amendment. United States Memorandum at 15. But the government makes no effort to satisfy the requirements for establishing such an implied repeal. The reasons articulated in support of its latest position are not convincing.

A. Akin.

Akin is not controlling on the disclaimer issue. Colorado is not a disclaimer state. For this reason, the disclaimers were not discussed or cited in the lower court's opinion or in the briefs of any of the parties.[26] Nor were they mentioned in the majority or dissenting opinions in this Court. In these circumstances, the government reads far far too much into the court's disposition. "Questions which merely lurk in the record, neither brought to the attention of the court nor ruled upon, are not to be considered as having been so decided as to constitute prece-

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[25]The United States neglects to mention that it argued in support of the position now advocated by the Tribes before the federal district court in Montana in this very suit, before the Arizona courts in the parallel state court proceedings, and in various other pending suits in the federal and state courts. All of these arguments were made by the government after the 1976 decision in *Akin*, which now is viewed as inconsistent with that conclusion. These vacillations deprive the government's current view of any significance to which it might otherwise be entitled. Batterton v. Francis, 432 U. S. 416, 425 n. 9 (1977); General Electric Co. v. Gilbert, 429 U. S. 125, 140-43 (1976); United States v. Oklahoma Gas & Electric Co., 318 U. S. 206, 217-18 (1943).

[26]The disclaimers were discussed in the Amici Curiae Brief of Southern Ute Tribe, et al., but that is plainly an insufficient basis on which to predicate an important ruling. See Landon v. Plasencia, 103 S. Ct. 321, 331, n. 9 (1982).

dents." *KVOS v. Associated Press*, 299 U.S. 269, 279 (1936). *See also, McNeal v. Culver*, 365 U.S. 109, 117 (1961).[27]

Without considering the effect of the disclaimers, *Akin* held that Indian water rights are encompassed within the McCarran Amendment's waiver of sovereign immunity. But it does not follow that McCarran silently removed the Enabling Act and state Constitutional impediments to the exercise of state court jurisdiction. *Akin* also held that federal courts are appropriate forums for the resolution of federal reserved water rights. *See also, Cappaert v. United States*, 426 U.S. 128, 145 (1976). As we have noted throughout this Brief, effect can be given to the McCarran Act's waiver of sovereign immunity and its policy of subjecting all of the government's water rights to adjudication without abrogating the Indian rights and immunities secured by the disclaimers by holding that the water rights of Indians in the disclaimer states must be adjudicated in the federal courts. This middle ground removes the immunity defense that had enabled the government to resist *all* involuntary adjudications of its water rights, while at the same time preserving the traditional role of the federal courts as the exclusive arbiters of Indian property disputes in the states where more than 90% of the Indian

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[27]The government's turnabout is puzzling. If a uniform rule for disclaimer and non-disclaimer states is necessary or desirable, then the disclaimers were a crucial, perhaps even dispositive, factor in the *Akin* case. Yet the government made no mention of them.

It would appear that the force of the argument in support of the Tribes' disclaimer position, United States Memorandum at 9-12, coupled with the government's concern for symmetry and the fact that 90% of the Indian lands in the country are located in disclaimer states, *Id.* at 12-13, would lead the United States to urge reconsideration of *Akin*. Indeed, that was precisely the position urged by the United States in its Memorandum urging that certiorari be granted in Jicarilla Apache Tribe v. United States, 444 U.S. 995 (1979).

lands are located. *See Minnesota v. United States*, 305 U. S. 382, 389 (1939).[28]

B. Practical effects.

The United States suggests that the Tribes' position on the disclaimers "makes little practical sense," United States Memorandum at 15, but in actuality there is little difference between the government's position and the Tribes'. Under the government's view of "wise judicial administration," "federal courts [should be] require[d] to adjudicate Indian Reservation water rights when their jurisdiction is timely invoked, whether by the Tribe or the United States." United States Memorandum at 22. The Tribes endorse this position as an alternative in the event the disclaimer argument against state court jurisdiction is rejected. But there is little practical difference between the government's position, under which state jurisdiction effectively would be preempted by timely filed federal suits, and the Tribes' position, under which suits seeking to adjudicate Indian water rights in disclaimer states would have to be filed in the federal courts in the first instance.

Under either the government's or the Tribe's position, there is no danger that unadjudicated Indian water rights would indefinitely cloud the title of non-Indian claimants

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[28] *Akin* expressed concern that excluding Indian water rights from adjudication in state courts might necessitate federal district court adjudications of all non-Indian as well as Indian rights. This concern has not materialized. See Memorandum for the United States on Petitions for Writs of Certiorari at 17-19. For example, after the Ninth Circuit's decisions in these cases, the Montana Supreme Court stated that "[t]he pendency of federal litigation does not affect the State of Montana in proceeding to adjudicate non-Indian claims." Arizona's water adjudication statute expressly provides for the incorporation of water rights decrees issued by other courts. ARS 257 (B) (1). Thus, federal court adjudications of Indian rights can be accommodated with and integrated into a comprehensive decree that incorporates all state and federal rights on a stream system.

to the same sources since state or private water users could file suits against the United States in the federal court to adjudicate Indian rights. The federal courts would have federal question jurisdiction over such suits. *See Oneida Indian Nation v. County of Oneida*, 414 U. S. 661 (1974); *In re General Adjudication of All Rights to Use Water and Water Rights on the Missouri River in South Dakota*, 531 F. Supp. 449, 454-55 (D. S. D. 1982). And the United States acknowledges in its Brief on the merits that the McCarran Amendment waives its immunity in federal court suits to adjudicate Indian rights provided that there are concurrent state court proceedings adjudicating all other rights on the stream system.

Hence, the only practical difference between the position now advanced by the United States and the Tribes' disclaimer argument is that the United States would leave open the possibility of adjudications of Indian rights taking place in disclaimer state courts if neither the affected tribe nor the United States initiates a federal court suit. As illustrated by these cases, however, the United States and/or the affected tribe will invaribly exercise that option. In actual practice, then, the difference between the tribal and government positions turns out to be more theoretical than real.

C. Alleged need for uniformity.

There is no apparent reason why disclaimer and non-disclaimer states must be subject to the same rule. The simple fact is that Arizona, Montana, and the other disclaimer states are governed by statutes and constitutional provisions that do not apply in non-disclaimer states. We accept the government's suggestion (United States Memorandum at 14) that the disclaimer provisions were initially intended merely to confirm what Congress already under-

stood to be the case, *i.e.*, that the exclusivity of federal jurisdiction over Indian lands was not affected by the formation of new states from the territories that included the reservations. The fact remains, however, that this Court had raised questions about that very subject in *McBratney*, and, following that decision, when Congress admitted new states containing large Indian reservations, it went out of its way to require them to recognize its "absolute jurisdiction and control" over Indian lands. Congress plainly intended that, whatever the courts ultimately might decide with respect to states admitted before *McBratney*, no question should arise regarding the exclusivity of federal jurisdiction in disclaimer states where most Indian lands are located. See discussion *supra* at 12-14.[29]

The fact that the same preemption and other jurisdictional principles have been applied to Indian disputes arising in both disclaimer and non-disclaimer states has no relevance to the question of whether a general Act of Congress that does not repeal or even mention the disclaimers should be deemed to confer jurisdiction on the disclaimer states. From a substantive standpoint, the disclaimers are but one of many sources of federal law that limit and preempt state authority over Indians. *See, e.g., White Mountain Apache Tribe v. Bracker*, 448 U.S. 136 (1980); *Bryan v. Itasca County*, 426 U.S. 373, 376 n. 2 (1976); *McClanahan v. Arizona Tax Comm'n.*, 411 U.S. 164 (1973). *See generally*, F. Cohen, *Handbook of Federal Indian Law*,

[29]The legislative history of the 1889 Montana disclaimer specifically calls attention to the "peculiar" and "extraordinary" provisions relating to Indians and Indian lands. 20 Cong. Rec. 812-13 (1889) (remarks of Dakota Delegate). In deliberately adopting a new form of Indian disclaimer, Congress presumably recognized that this departure from the norm would make some difference.

Chapt. 5 (1982 ed.). The absence of the disclaimer is therefore unlikely to be dispositive when the issue is whether state law has been preempted by federal statutes and treaties or by Indian sovereignty. But as demonstrated by *Yakima*, the procedural impediments to state jurisdiction in the disclaimers are relevant and do make a difference.

The Enabling Acts and their disclaimer provisions are valid federal statutes. They have not been repealed, and they cannot be ignored simply to satisfy the desire for a uniform rule applicable to all western states[30] Moreover, as the government observes (United States Memorandum at 12-13), the disclaimer states include more than 90% of the Indian lands in the country, including the 21 largest reservations.[31] They are the rule, not the exception. It would be bizarre indeed to strain to find in the McCarran Amendment an intent to impliedly repeal the

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[30]This is especially true of a provision that was enacted by the Congress no fewer than 8 times and was made applicable to 11 states between 1889 and 1959. *See* the United States' Memorandum at 12 n. 18. Even without the subsequent enactments, the governing rule is that effect must be given to all statutes and to all of their parts. American Textile Mfrs. Institute, Inc. v. Donovan, 452 U. S. 490, 513 (1981); Reiter v. Sonotone Corp., 442 U. S. 330, 338-39 (1979); United States v. United Continental Tuna Corp., 425 U. S. 164, 169 (1976).

Montana's express readoption of the Indian disclaimer in its 1972 Constitution indicates that the people of the State believed that the disclaimers continued to play an important role in restraining the State's involvement in Indian affairs.

[31]This fact, standing alone, justifies disparate treatment. The amount of Indian reserved water is generally a function of the size of a reservation. *See* Arizona v. California, 373 U. S. 546, 595-601 (1963). The greater the amount of reserved water claimed by a tribe, the more likely such claims are to provoke the emotional and political controversy that render such disputes unsuitable for adjudication before elected state

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disclaimers just so the few disclaimer states could be treated like the many non-disclaimer states.[32]

If there must be uniformity, the logical method of achieving it would be to conform the practices in non-disclaimer states with those in disclaimer states, not *vice versa*. That would, of course, entail reconsideration of *Akin*. We believe that the Court should undertake that salutary task in light of the disclaimer provisions, the subsequent enactments of 28 U. S. C. § 1362 and Pub. L. 280, and the paucity of evidence that the McCarran Amendment was intended to permit state court adjudications of Indian rights.

But, even if the Court is not inclined to reconsider *Akin*, Indian rights in disclaimer states can and should be restricted to adjudication in federal court, either through suits brought by the tribes themselves or by the United States as trustee, or through suits against the United States under the McCarran Amendment. That will ac-

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judges. *See* Introduction and Part I of the Brief of the Assiniboine and Sioux Tribes, et al. Exclusive federal court jurisdiction over the most controversial Indian water rights cases is in keeping with the protective purpose underlying virtually all federal Indian policy. *See, e. g.*, Wilson v. Omaha Indian Tribe, 442 U. S. 653, 665-66 (1979); Minnesota v. United States, 305 U. S. 382, 389 (1939).

[32]As it happens, the Pyramid Lake and Walker River Reservations, the two largest in Nevada, one of the four western non-disclaimer states, had federal court adjudications of their water rights prior to McCarran's enactment. *See* United States v. Truckee-Carson Irrigation District, 649 F. 2d 1286, 1290-95 (9th Cir. 1981), *modified*, 666 F. 2d 351 (9th Cir. 1982), *cert. granted*, — U. S. — (October 12, 1982); United States v. Walker River Irrig. Dist., 104 F. 2d 334 (9th Cir. 1939). And the water rights of four of the larger California reservations were, and are being, determined in Arizona v. California, No. 8 Original, 373 U. S. 546, 595-601 (1963), now pending on supplemental motions argued December 8, 1982.

complish the Amendment's principal objective of ensuring that all claimants, including the United States, are bound by the outcome of water rights litigation, and it will do so without denying the Tribes their right to a federal forum.

D. Equal footing.

The government suggests that different procedural rules in disclaimer and non-disclaimer states "would present at least an arguable question under the Equal Footing Doctrine." United States Memorandum at 14. The point is insubstantial.[33]

It has long been settled that Congress can impose any condition, however unique, on a prospective state's admission to the Union, provided that it does not exceed the powers delegated to the national government by the Constitution. *Ex parte Webb*, 225 U. S. 663, 689-91 (1912); *Coyle v. Smith*, 221 U. S. 559, 574 (1911). *See also, Dick v. United States*, 208 U. S. 340, 353-54 (1908). Because Congress has virtually unlimited authority to regulate Indian affairs, *Worcester v. Georgia*, 31 U. S. (6 Pet.) 515, 559 (1832), laws according disparate jurisdictional treatment to Indians in various states or imposing different barriers to the assumption of state jurisdiction are clearly constitutional and therefore are not subject to challenge on equal footing grounds. *See United States v. John*, 437 U. S. 634, 652-54 (1978); *Antoine v. Washington*, 420 U. S.

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[33]No one has challenged the distinction between disclaimer and non-disclaimer states on equal protection grounds, evidently because the Court's decisions leave no room for any such contention. *Yakima, supra*, 439 U. S. at 500-01; Delaware Tribal Business Committee v. Weeks, 430 U. S. 73, 84-85 (1977); Morton v. Mancari, 417 U. S. 535, 555 (1974).

194, 200-04 (1975). *See also,* F. Cohen, *Handbook of Federal Indian Law* 268 n. 73 (1982).[34]

E. Role of the Congress and the Court.

In the final analysis, the argument against giving effect to the disclaimers is predicated on the absence of any evidence that the 1952 Congress contemplated that different rules would be applied in disclaimer and non-disclaimer states. That is not surprising in view of the lack of congressional attention directed to the effect of the McCarran Amendment on Indian water rights. *See supra,* at 22-27. But neither the lack of such legislative history nor questions concerning the practical effect of the disclaimers can sanction disregarding their plain meaning or substitute for the clear and manifest intent required for an implied repeal. *See Central Trust Co. v. Geiger Enterprises,* 102 S. Ct. 695, 698 (1982) (per curium); *Harrison v. PPG Industries, Inc.,* 446 U. S. 578, 591-92 (1980). The fact that Congress might not have fully anticipated all of the consequences of its legislation is irrelevant. Even if, contrary to the circumstances of this case, the unforeseen result turns out to be mischievous, absurd, or otherwise objectionable, "the remedy lies with the law-making authority, and not with the courts." *Griffin v. Oceanic Contractors, Inc.,* 102 S. Ct. 3245, 3252 (1982), quoting *Crooks v. Harrelson,* 282 U. S. 55, 60 (1930).

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[34]Numerous federal laws regarding Indians distinguish among the states. 25 U. S. C. §§ 232 and 233 are applicable only to Indians and Indian reservations in New York. Pub. L. 280 confers civil and criminal jurisdiction on five named non-disclaimer states, but two such states with Indian lands and populations, Colorado and Nevada, are excluded. Some non-disclaimer states were granted jurisdiction over all Indian reservations under Pub. L. 280, but others were made subject to exceptions. 25 U. S. C. § 304 subjects Indian schools in South Dakota to that state's minimum education requirements. *See also, Yakima, supra,* 439 U. S. at 471 n. 8.

The respondent Indian Tribes in Montana and Arizona are the direct, named and intended beneficiaries of the disclaimers of jurisdiction over Indian lands in the States' Constitutions and Enabling Acts. An intent to abrogate the rights and immunities granted to the Tribes by these laws should not lightly be attributed to the Congress, *Bryan v. Itasca County*, 426 U.S. 373, 392-93 (1976), particularly when the Tribes' most vital resource is at issue, *Winters v. United States*, 207 U.S. 564, 576, 577 (1908). A ruling that the disclaimers do not make any difference or that they were implicitly repealed by a law that does not mention Indians and totally ignores the disclaimers would "certainly [be] an impotent outcome to negotiations and a convention which seemed to promise more, and give the word of the nation for more." *United States v. Winans*, 198 U.S. 371, 380 (1905). If the water rights held by Indian tribes in the disclaimer states are to be subjected to state court jurisdiction, it should be done clearly and explicitly by the Congress. *Williams v. Lee*, 358 U.S. 217, 223 (1959). This Court should presume that great nations, like great men, have kept their word. *See FPC v. Tuscarora Indian Nation*, 362 U.S. 99, 142 (1962) (Black, J. dissenting).

CONCLUSION

The judgment of the court of appeals in the *Montana* case should be affirmed. The judgments in the *Arizona*

case should be modified to require retention of federal court jurisdiction.

Respectfully submitted,

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January, 1983.

APPENDIX

1. Relevant parts of the Enabling Act for Montana and three other states, 25 Stat. 676-77 (1889):

AN ACT to provide for the division of Dakota into two states and to enable the people of North Dakota, South Dakota, Montana and Washington to form constitutions and state governments and to be admitted into the Union on an equal footing with the original states, and to make donations of public lands to such states.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

That the inhabitants of all that part of the area of the United States now constituting the territories of Dakota, Montana, and Washington, as at present described, may become the states of North Dakota, South Dakota, Montana, and Washington, respectively, as hereinafter provided.

* * *

§ 4. That the delegates to the conventions elected as provided for in this act shall meet at the seat of government of each of said territories, . . . and, after organization, shall declare, on behalf of the people of said proposed states, that they adopt the constitution of the United States; whereupon the said conventions shall be, and are hereby, authorized to form constitutions and state governments for said proposed states, respectively. The constitutions shall be republican in form, and make no distinction in civil or political rights on account of race or color, except as to Indians not taxed, and not be repug-

nant to the constitution of the United States and the principles of the Declaration of Independence. And said conventions shall provide, by ordinances irrevocable without the consent of the United States and the people of said states:

• • •

Second. That the people inhabiting said proposed states do agree and declare that they forever disclaim all right and title to the unappropriated public lands lying within the boundaries thereof, and to all lands lying within said limits owned or held by any Indian or Indian tribes; and that until the title thereto shall have been extinguished by the United States, the same shall be and remain subject to the disposition of the United States, and said Indian lands shall remain under the absolute jurisdiction and control of the congress of the United States; that the lands belonging to citizens of the United States residing without the said states shall never be taxed at a higher rate than the lands belonging to residents thereof; that no taxes shall be imposed by the states on lands or property therein belonging to or which may hereafter be purchased by the United States or reserved for its use. But nothing herein, or in the ordinances herein provided for, shall preclude the said states from taxing as other lands are taxed any lands owned or held by any Indian who has severed his tribal relations, and has obtained from the United States or from any person a title thereto by patent or other grant, save and except such lands as have been or may be granted to any Indian or Indians under any act of congress containing a provision exempting the lands thus granted from taxation; but said ordinances shall provide that all such lands shall be exempt from

taxation by said states so long and to such extent as such acts of congress may prescribe.

2. Relevant parts of the Montana Constitution, Ordinance No. 1 (1889):

ORDINANCE NO. 1

Federal Relations

BE IT ORDAINED:

* * *

Second. That the people inhabiting the said proposed state of Montana, do agree and declare that they forever disclaim all right and title to the unappropriated public lands lying within the boundaries thereof, and to all lands lying within said limits owned or held by any Indian or Indian tribes, and that until the title thereto shall have been extinguished by the United States, the same shall be and remain subject to the disposition of the United States, and said Indian lands shall remain under the absolute jurisdiction and control of the congress of the United States, that the lands belonging to citizens of the United States, residing without the said state of Montana, shall never be taxed a higher rate than the lands belonging to residents thereof; that no taxes shall be imposed by the said state of Montana on lands or property therein belonging to, or which may hereafter be purchased by the United States or reserved for its use. But nothing herein contained shall preclude the said state of Montana from taxing as other lands are taxed any lands owned or held by any Indian who has severed his tribal relations and has obtained from

the United States or from any person a title thereto by patent or other grant, save and except such lands as have been or may be granted to any Indian or Indians under any act of congress containing a provision exempting the lands thus granted from taxation, but said last named lands shall be exempt from taxation by said state of Montana so long and to such extent as such act of congress may prescribe.

• • •

Sixth. That the ordinances in this article shall be irrevocable without the consent of the United States and the people of said state of Montana.

3. Relevant parts of the Montana Constitution (1972):

ARTICLE 1

COMPACT WITH THE UNITED STATES

All provisions of the enabling act of Congress (approved February 22, 1889, 25 Stat. 676), as amended and of Ordinance No. 1, appended to the Constitution of the state of Montana and approved February 22, 1889, including the agreement and declaration that all lands owned or held by any Indian or Indian tribes shall remain under the absolute jurisdiction and control of the congress of the United States, continue in full force and effect until revoked by the consent of the United States and the people of Montana.

4. Relevant parts of the Enabling Act for New Mexico and Arizona, 36 Stat. 557, 557, 568-69 (1910):

• • •

An act to enable the people of New Mexico to form a constitution and state government and be admitted into the Union on an equal footing with the original States; and to enable the people of Arizona to form a constitution and state government and be admitted into the Union on an equal footing with the original States.

* * *

SEC. 19. That the qualified electors of the Territory of Arizona are hereby authorized to vote for and choose delegates to form a constitutional convention for said Territory for the purpose of framing a constitution for the proposed State of Arizona.

* * *

SEC. 20. That the delegates to the convention thus elected shall meet in the hall of the house of representatives in the capitol of the Territory of Arizona at twelve o'clock noon on the fourth Monday after their election,

. . .

after organization they shall declare on behalf of the people of said proposed State that they adopt the Constitution of the United States, whereupon the said convention shall be, and is hereby, authorized to form a constitution and provide for a state government for said proposed State, all in the manner and under the conditions contained in this Act. The constitution shall be republican in form and make no distinction in civil or political rights on account of race or color, and shall not be repugnant to the Constitution of the United States and the principles of the Declaration of Independence.

And said convention shall provide, by an ordinance irrevocable without the consent of the United States and the people of said State—

* * *

Second. That the people inhabiting said proposed State do agree and declare that they forever disclaim all right and title to the unappropriated and ungranted public lands lying within the boundaries thereof and to all lands lying within said boundaries owned or held by any Indian or Indian tribes, the right or title to which shall have been acquired through or from the United States or any prior sovereignty, and that until the title of such Indian or Indian tribes shall have been extinguished the same shall be and remain subject to the disposition and under the absolute jurisdiction and control of the Congress of the United States; that the lands and other property belonging to citizens of the United States residing without the said State shall never be taxed at a higher rate than the lands and other property belonging to residents thereof; that no taxes shall be imposed by the State upon lands or property therein belonging to or which may hereafter be acquired by the United States or reserved for its use: but nothing herein, or in the ordinance herein provided for, shall preclude the said State from taxing as other lands and other property are taxed any lands and other property outside of an Indian reservation owned or held by any Indian, save and except such lands as have been granted or acquired as aforesaid or as may be granted or confirmed to any Indian or Indians under any Act of Congress, but said ordinance shall provide that all such lands shall be exempt from taxation by said State so long and to such extent as Congress has prescribed or may hereafter prescribe.

5. Relevant parts of the Arizona Constitution:

ARTICLE XX

ORDINANCE

The following ordinance shall be irrevocable without the consent of the United States and the people of this State:

• • •

FOURTH. PUBLIC LANDS; INDIAN LANDS

Fourth. The people inhabiting this State do agree and declare that they forever disclaim all right and title to the unappropriated and ungranted public lands lying within the boundaries thereof and to all lands lying within said boundaries owned or held by any Indian or Indian tribes, the right or title to which shall have been acquired through or from the United States or any prior sovereignty, and that, until the title of such Indian or Indian tribes shall have been extinguished, the same shall be, and remain, subject to the disposition and under the absolute jurisdiction and control of the Congress of the United States.

FIFTH. TAXATION

Fifth. The lands and other property belonging to citizens of the United States residing without this State shall never be taxed at a higher rate than the lands and other property situated in this State belonging to residents thereof, and no taxes shall be imposed by this State on any lands or other property within an Indian Reservation owned or held by any Indian; but nothing herein shall

preclude the State from taxing as other lands and other property are taxed, any lands and other property outside of an Indian Reservation owned or held by any Indian, save and except such lands as have been granted or acquired as aforesaid, or as may be granted or confirmed to any Indian or Indians under any act of Congress.

6. The McCarran Amendment, Section 208 of the Department of Justice Appropriation Act for 1953, 66 Stat. 560 (1952), partially codified at 43 U. S. C. § 666, provides in its entirety:

> "(a) Consent is hereby given to join the United States as a defendant in any suit (1) for the adjudication of rights to the use of water of a river system or other source, or (2) for the administration of such rights, where it appears that the United States is the owner of or is in the process of acquiring water rights by appropriation under State law, by purchase, by exchange, or otherwise, and the United States is a necessary party to such suit. The United States, when a party to any such suit, shall (1) be deemed to have waived any right to plead that the State laws are inapplicable or that the United States is not amenable thereto by reason of its sovereignty, and (2) shall be subject to the judgments, orders, and decrees of the court having jurisdiction, and may obtain review thereof, in the same manner and to the same extent as a private individual under like circumstances: *Provided,* That no judgment for costs shall be entered against the United States in any such suit.
>
> "(b) Summons or other process in any such suit shall be served upon the Attorney General or his designated representative.
>
> "(c) Nothing in this Act shall be construed as authorizing the joinder of the United States in any suit or controversy in the Supreme Court of the Unit-

ed States involving the right of States to the use of the water of any interstate stream.

"(d) None of the funds appropriated by this title may be used in the preparation or prosecution of the suit in the United States District Court for the Southern District of California, Southern Division, by the United States of America against Fallbrook Public Utility District, a public service corporation of the State of California, and others."

7. Public Law 83-280, 67 Stat. 589, partially codified at 18 U. S. C. § 1162 and 28 U. S. C. § 1360, provides in its entirety:

AN ACT

To confer jurisdiction on the States of California, Minnesota, Nebraska, Oregon, and Wisconsin, with respect to criminal offenses and civil causes of action committed or arising on Indian reservations within such States, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That chapter 53 of title 18, United States Code, is hereby amended by inserting at the end of the chapter analysis preceding section 1151 of such title the following new item:

"1162. State jurisdiction over offenses committed by or against Indians in the Indian country."

SEC. 2. Title 18, United States Code, is hereby amended by inserting in chapter 53 thereof immediately after section 1161 a new section, to be designated as section 1162, as follows:

"§ 1162. State jurisdiction over offenses committed by or against Indians in the Indian country

"(a) Each of the States listed in the following table shall have jurisdiction over offenses committed by or against Indians in the areas of Indian country listed opposite the name of the State to the same extent that such State has jurisdiction over offenses committed elsewhere within the State, and the criminal laws of such State shall have the same force and effect within such Indian country as they have elsewhere within the State:

"State of	Indian country affected
California	All Indian country within the State
Minnesota	All Indian country within the State, except the Red Lake Reservation
Nebraska	All Indian country within the State
Oregon	All Indian country within the State, except the Warm Springs Reservation
Wisconsin	All Indian country within the State, except the Menominee Reservation

"(b) Nothing in this section shall authorize the alienation, encumbrance, or taxation of any real or personal property, including water rights, belonging to any Indian or any Indian tribe, band, or community that is held in trust by the United States or is subject to a restriction against alienation imposed by the United States; or shall authorize regulation of the use of such property in a manner inconsistent with any Federal treaty, agreement, or statute or with any regulation made pursuant thereto; or shall deprive any Indian or any Indian tribe, band, or com-

munity of any right, privilege, or immunity afforded under Federal treaty, agreement, or statute with respect to hunting, trapping, or fishing or the control, licensing, or regulation thereof.

"(c) The provisions of sections 1152 and 1153 of this chapter shall not be applicable within the areas of Indian country listed in subsection (a) of this section."

SEC. 3. Chapter 85 of title 28, United States Code, is hereby amended by inserting at the end of the chapter analysis preceding section 1331 of such title the following new item:

"1360. State civil jurisdiction in actions to which Indians are parties."

SEC. 4. Title 28, United States Code, is hereby amended by inserting in chapter 85 thereof immediately after section 1359 a new section, to be designated as section 1360, as follows:

"§ 1360. State civil jurisdiction in actions to which Indians are parties

"(a) Each of the States listed in the following table shall have jurisdiction over civil causes of action between Indians or to which Indians are parties which arise in the areas of Indian country listed opposite the name of the State to the same extent that such State has jurisdiction over other civil causes of action, and those civil laws of such State that are of general application to private persons or private property shall have the same force and effect within such Indian country as they have elsewhere within the State:

"State of — Indian country affected

California—All Indian country within the State

Minnesota—All Indian country within the State, except the Red Lake Reservation

Nebraska—All Indian country within the State

Oregon—All Indian country within the State, except the Warm Springs Reservation

Wisconsin—All Indian country within the State, except the Menominee Reservation

"(b) Nothing in this section shall authorize the alienation, encumbrance, or taxation of any real or personal property, including water rights, belonging to any Indian or any Indian tribe, band, or community that is held in trust by the United States or is subject to a restriction against alienation imposed by the United States; or shall authorize regulation of the use of such property in a manner inconsistent with any Federal treaty, agreement, or statute, or with any regulation made pursuant thereto; or shall confer jurisdiction upon the State to adjudicate, in probate proceedings or otherwise, the ownership or right to possession of such property or any interest therein.

"(c) Any tribal ordinance or custom heretofore or hereafter adopted by any Indian tribe, band, or community in the exercise of any authority which it may possess shall, if not inconsistent with any applicable civil law of the State, be given full force and effect in the determination of civil causes of action pursuant to this section."

SEC. 5. Section 1 of the Act of October 5, 1949 (63 Stat. 705, ch. 604), is hereby repealed, but such repeal

shall not affect any proceedings heretofore instituted under that section.

SEC. 6. Notwithstanding the provisions of any Enabling Act for the admission of a State, the consent of the United States is hereby given to the people of any State to amend, where necessary, their State constitution or existing statutes, as the case may be, to remove any legal impediment to the assumption of civil and criminal jurisdiction in accordance with the provisions of this Act: *Provided,* That the provisions of this Act shall not become effective with respect to such assumption of jurisdiction by any such State until the people thereof have appropriately amended their State constitution or statutes as the case may be.

SEC. 7. The consent of the United States is hereby given to any other State not having jurisdiction with respect to criminal offenses or civil causes of action, or with respect to criminal offenses or civil causes of action, or with respect to both, as provided for in this Act, to assume jurisdiction at such time and in such manner as the people of the State shall, by affirmative legislative action, obligate and bind the State to assumption thereof.

8. The 1968 Amendments to Public Law 83-280, 82 Stat. 77, 78-80, codified at 25 U. S. C. §§ 1321-26, provide in their entirety:

TITLE IV—JURISDICTION OVER CRIMINAL AND CIVIL ACTIONS

ASSUMPTION BY STATE

SEC. 401. (a) The consent of the United States is hereby given to any State not having jurisdiction over

criminal offenses committed by or against Indians in the areas of Indian country situated within such State to assume, with the consent of the Indian tribe occupying the particular Indian country or part thereof which could be affected by such assumption, such measure of jurisdiction over any or all of such offenses committed within such Indian country or any part thereof as may be determined by such State to the same extent that such State has jurisdiction over any such offense committed elsewhere within the State, and the criminal laws of such State shall have the same force and effect within such Indian country or part thereof as they have elsewhere within that State.

(b) Nothing in this section shall authorize the alienation, encumbrance, or taxation of any real or personal property, including water rights, belonging to any Indian or any Indian tribe, band, or community that is held in trust by the United States or is subject to a restriction against alienation imposed by the United States; or shall authorize regulation of the use of such property in a manner inconsistent with any Federal treaty, agreement, or statute or with any regulation made pursuant thereto; or shall deprive any Indian or any Indian tribe, band, or community of any right, privilege, or immunity afforded under Federal treaty, agreement, or statute with respect to hunting, trapping, or fishing or the control, licensing, or regulation thereof.

ASSUMPTION BY STATE OF CIVIL JURISDICTION

SEC. 402. (a) The consent of the United States is hereby given to any State not having jurisdiction over

civil causes of action between Indians or to which Indians are parties which arise in the areas of Indian country situated within such State to assume, with the consent of the tribe occupying the particular Indian country or part thereof which would be affected by such assumption, such measure of jurisdiction over any or all such civil causes of action arising within such Indian country or any part thereof as may be determined by such State to the same extent that such State has jurisdiction over other civil causes of action, and those civil laws of such State that are of general application to private persons or private property shall have the same force and effect within such Indian country or part thereof as they have elsewhere within that State.

(b) Nothing in this section shall authorize the alienation, encumbrance, or taxation of any real or personal property, including water rights, belonging to any Indian or any Indian tribe, band, or community that is held in trust by the United States or is subject to a restriction against alienation imposed by the United States; or shall authorize regulation of the use of such property in a manner inconsistent with any Federal treaty, agreement, or statute, or with any regulation made pursuant thereto; or shall confer jurisdiction upon the State to adjudicate, in probate proceedings or otherwise, the ownership or right to possession of such property or any interest therein.

(c) Any tribal ordinance or custom heretofore or hereafter adopted by an Indian tribe, band, or community in the exercise of any authority which it may possess shall, if not inconsistent with any applicable civil law of the State, be given full force and effect in the determination of civil causes of action pursuant to this section.

RETROCESSION OF JURISDICTION BY STATE

SEC. 403. (a) The United States is authorized to accept a retrocession by any State of all or any measure of the criminal or civil jurisdiction, or both, acquired by such State pursuant to the provisions of section 1162 of title 18 of the United States Code, section 1360 of title 28 of the United States Code, or section 7 of the Act of August 15, 1953 (67 Stat. 588), as it was in effect prior to its repeal by subsection (b) of this section.

(b) Section 7 of the Act of August 15, 1953 (67 Stat. 588), is hereby repealed, but such repeal shall not affect any cession of jurisdiction made pursuant to such section prior to its repeal.

CONSENT TO AMEND STATE LAWS

SEC. 404. Notwithstanding the provisions of any enabling Act for the admission of a State, the consent of the United States is hereby given to the people of any State to amend, where necessary, their State constitution or existing statutes, as the case may be, to remove any legal impediment to the assumption of civil or criminal jurisdiction in accordance with the provisions of this title. The provisions of this title shall not become effective with respect to such assumption of jurisdiction by any such State until the people thereof have appropriately amended their State constitution or statutes, as the case may be.

ACTIONS NOT TO ABATE

SEC. 405. (a) No action or proceeding pending before any court or agency of the United States immediately prior to any cession of jurisdiction by the United States

pursuant to this title shall abate by reason of that cession. For the purposes of any such action or proceeding, such cession shall take effect on the day following the date of final determination of such action or proceeding.

(b) No cession made by the United States under this title shall deprive any court of the United States of jurisdiction to hear, determine, render judgment, or impose sentence in any criminal action instituted against any person for any offense committed before the effective date of such cession, if the offense charged in such action was cognizable under any law of the United States at the time of the commission of such offense. For the purposes of any such criminal action, such cession shall take effect on the day following the date of final determination of such action.

SPECIAL ELECTION

SEC. 406. State jurisdiction acquired pursuant to this title with respect to criminal offenses or civil causes of action, or with respect to both, shall be applicable in Indian country only where the enrolled Indians within the affected area of such Indian country accept such jurisdiction by a majority vote of the adult Indians voting at a special election held for that purpose. The Secretary of the Interior shall call such special election under such rules and regulations as he may prescribe, when requested to do so by the tribal council or other governing body, or by 20 percentum of such enrolled adults.